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IN THE

SUPREME COURT OF THE UNITED STATES.

SEPTEMBER TERM, 1957.

No. 648

VAUGHN C. PAYNE and EDITH PRUITT PAYNE,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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To the United States Court of Appeals for the Eighth Circuit.

Petitioners respectfully pray that a Writ of Certiorari shall issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in the above entitled case, being Cause No. 15620 in said Court. A copy of the opinion is appended to this Petition.

JURISDICTION.

Judgment of the Circuit Court of Appeals for the Eighth Circuit was rendered on August 8, 1957, and entered on August 8, 1957. Petition for rehearing was denied on September 17, 1957.

Jurisdiction of this Court is invoked under Title 28, U. S. C. A., 1254, and under Rule 19, 1 (b) of the Supreme Court Rules.

THE QUESTIONS PRESENTED ARE:

1. Whether a spouse can be held liable for the income tax deficiencies of her husband if joint returns have not been filed.

2. Whether real estate held by the entirety is subject to a lien for the taxes of one spouse.

3. Whether real estate which vested by the entirety in 1944 and 1945, respectively, is subject to a lien against one spouse which arose in 1949.

4. Whether real estate held by the entirety can be sold to satisfy the tax delinquency of one spouse.

5. Whether a lien can attach to the sole property of one spouse for the delinquent taxes against her husband.

6. Whether a lien can attach to the individually held property of a spouse for the delinquent taxes of her husband when no notice was given her, no demand was made and no assessment was asserted against her.

7. Whether the individually held property of the spouse can be sold to satisfy the delinquent taxes of her husband.

8. Whether property of one spouse can be levied upon as a transferee to satisfy the tax delinquencies of her husband when no assessment was made against her.

9. Whether in a suit based upon the assessment and lien theory a transferee can be held liable for the delinquent taxes of the transferor when there has been no assessment against the transferee.

10. Whether fraud penalties can be imposed when fraud has not been pleaded.

11. Whether a lien covering fraud penalties can be imposed upon property of a transferee which vested in 1944, 1945 and 1947, respectively, for an assessment made against the transferor in 1949.

STATUTES AND RULES WHICH THIS CASE INVOLVES.

26 U. S. C. A. 51 (b) (1) (I. R. C. 1939):

"* * * If a joint return is made * * * the liability with respect to the tax shall be joint and several."

26 U. S. C. A. (I. R. C., 1939), 3671:

"Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time" (53 Stat. 449).

26 U. S. C. A. (I. R. C., 1939), 3670:

"If any person liable to pay any tax neglects or refuses to pay the same **after demand**, the amount * * * shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person" (53 Stat. 448). (Emphasis ours.)

Rule 9 (b), Rules of Civil Procedure, 28 U. S. C. A., page 316:

"In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."

STATEMENT OF THE CASE.

This was an action against Vaughn Payne for the collection of taxes, and for the enforcement of a lien upon his property for the payment of such taxes (Record, pages 1 and 3 which states that the action is brought pursuant to 28 U. S. C., Sec. 1396 and 26 U. S. C., Section 3678).

The notice of assessment was given July 1, 1949; the assessment list was received by the Collector of Internal Revenue on July 11, 1949 (Record, page 34).

The lien date is August 12, 1949. The certificate of assessment and the notice of tax lien named Vaughn Payne individually (Record, pages 58 and 59).

Edith Payne, wife of taxpayer, was not a taxpayer. She was made a defendant as an alleged transferee of his property (Record, page 3); and it was claimed that the plaintiff acquired liens on property transferred to her (Record, page 3).

No notice, demand or assessment was ever made against Edith Payne (Record, pages 25, 28); and no tax lien was ever directed to her (Record, page 59).

Judgment was rendered against Vaughn Payne for $19,799.21 for delinquent taxes, fraud penalties, interest and costs; and it was ordered and decreed that two parcels of real property held by defendants as tenants by the entirety and one parcel held solely by Edith Payne, be sold to satisfy the liens which the plaintiff had against Vaughn Payne individually. It was further ordered and adjudged that the plaintiff was entitled to a reformation of title with respect to the real estate held by the entirety, and the one parcel held by Edith Payne alone so that title should be considered to have been solely the property of Vaughn Payne for the purpose of enforcing the tax lien against him (Record, pages 40-42).

The two pieces of real estate held by the entirety vested in Vaughn and Edith Payne, respectively, in 1944 and 1945 (Record, page 60); and the one parcel vested in Edith Payne individually in 1947 (Record, page 27).

The tax lien dated August 12, 1949, named Vaughn Payne only (Record, pages 58-59) and the lien did not appear on the assessment list until 1949 (Record, page 25). Despite this, however, the Court ordered the sale of all of said real estate to cover the tax delinquencies of Vaughn Payne individually.

REASONS FOR ALLOWANCE OF WRIT.

1. The opinion below should be reviewed because it erroneously adjudges and holds that real estate held by the entirety is subject to a lien for the taxes of one spouse. It sanctioned the sale of two parcels of real estate held by the entirety since 1944 and 1945, respectively, for a lien which was asserted against the husband alone in 1949. This is in direct conflict with **U. S. v. Hutcherson**, 188 Fed. (2d) 326; **Raffaele v. Granger, C. I. R.**, 196 Fed. (2d) 620, and **U. S. v. Nathanson**, 60 Fed. Supp. 193, all of which hold that real estate held by the entirety is not subject to a lien for the taxes of one spouse.

2. The opinion below erroneously adjudges that the individually held property of Mrs. Payne is liable for the delinquent taxes of her husband. It held that real estate which vested in Mrs. Payne alone in 1947 is subject to a lien against her husband which did not arise until 1949. This is directly contrary to **Harris v. Commissioner**, 174 Fed. (2d), page 70 (note on page 71), which holds that one spouse is not liable for the taxes of the other when joint returns have not been filed. Section 51 (b) (1), Title 26, U. S. C. A. (I. R. C., 1939), provides for joint liability of husband and wife only when joint returns have been filed.

3. The opinion erroneously sustains liens which arose in 1949 against two parcels of real estate which had vested by the entirety in 1944 and 1945, and against one parcel which vested in Mrs. Payne alone in 1947. This is in direct conflict with 26 U. S. C. A. (I. R. C., 1939) 3671, which provides that a lien arises at the time the assessment list is received by the Collector of Internal Revenue. This principle has been enunciated in **United States v. Reese**, 131 Fed. (2d) 466, and in **Citizens State Bank o. Barstow v. Vedal**, 114 Fed. (2d) 380.

4. The opinion erroneously sustains a lien against Mrs. Payne's property even though she received no notice, demand or assessment. This is directly contrary to the holding of the Supreme Court of the United States in the case of **Detroit Bank v. U. S.**, 317 U. S. 329, 335, which holds that "there is no lien and no notice can be recorded until there has been a demand by the collector and a refusal to pay it by the taxpayer."

It is also directly in conflict with 26 U. S. C. A. (I. R. C., 1939) 3670, which provides that there must first be a demand against a taxpayer before a lien arises.

5. Judgment cannot be sustained against Mrs. Payne as a transferee because no assessment was made against her. The case of **U. S. v. Updike**, 32 Fed. (2d), page 1, unequivocally holds that in a **suit predicated upon an assessment** against the transferor, there must be an assessment against the transferee.

6. Judgment for fraud penalties cannot be sustained because fraud was not pleaded. **Kithcart v. Metropolitan Life Insurance Co.**, 88 Fed. (2d) 407; Rule 9 (b) Rules of Civil Procedure.

7. Judgment cannot be collected from proceeds of a foreclosure sale of a transferee's property which vested

several years prior to the assessment against the transferor.

The opinion rendered by the Circuit Court of Appeals adjudged that Mrs. Payne was not a taxpayer (Opinion, page 6). Despite this, however, the opinion sanctioned the sale of two parcels of real estate held by the entirety and one parcel owned solely by Mrs. Payne to satisfy the tax delinquency of Dr. Payne which was asserted several years after the titles had vested. The tax delinquency against Vaughn Payne was not asserted until 1949 (Record, pages 58-59); and yet the Court ordered the sale of real estate held by the entirety since 1944 and 1945, respectively, to satisfy said delinquency. It also ordered the sale of one parcel of real estate held individually by Mrs. Payne since 1947 to satisfy the tax delinquency against her husband which arose in 1949.

The law is clear that:

A. Edith Payne is not liable for the tax deficiencies of her husband.

Harris v. Commissioner, 174 Fed. (2d), page 70 (note on page 71);
26 U. S. C. A. 51 (b) (1) (I. R. C. 1939).

B. Real estate held by the entirety cannot be sold to satisfy the tax delinquency of one spouse.

U. S. v. Hutcherson, 188 Fed. (2d) 326;
Raffaele v. Granger, C. I. R., 196 Fed. (2d) 620;
U. S. v. Nathanson, 60 Fed. Supp. 193.

(This is particularly true when the lien did not arise until several years after the real estate had vested by the entirety. Section 3671 of 26 U. S. C. A. (I. R. C. 1939) provides:

"Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was re-

ceived by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time" (53 Stat. 449).

The lien in this case (against Vaughn Payne only) arose in 1949 (Record, pages 58 and 59), whereas the two parcels of real estate vested by the entirety, respectively, in 1944 and 1945 (Record, page 60).

A third parcel of real estate vested in Edith Payne alone in 1947 (Record, page 27). Yet all of this real estate was sold under a lien against Vaughn Payne which arose in 1949. Petitioners respectfully urge that no lien could attach to Edith Payne's property because no notice, demand or assessment was made against her. She was not a taxpayer. Under no circumstances should her property which vested in her in 1947 have been sold to satisfy a tax lien against her husband which did not arise until 1949—when the assessment list was received by the Collector.

Detroit Bank v. U. S., 317 U. S. 329, 335;
In re Holdsworth, 113 Fed. Supp. 878;
26 U. S. C. A. 3670 (I. R. C. 1939), 53 Stat. 448;
Harris v. Commissioner, 174 Fed. (2d) 70 (note on page 71).

The Circuit Court of Appeals sanctioned the sale of the real estate by holding:

"It is true that the decree included a declaration that the government had a lien upon the property involved against the wife as transferee. The property was not sold, however, upon the basis of a foreclosure of such a purported lien, but upon 'a reformation of the title' as to each of the three pieces of property, so as to vest all of them in Payne personally, and a foreclosing of the lien which thereupon would become perfected and legally existing against the properties by virtue of the filing of the assessment list **as to him in 1949.**" (Opinion, page 7.) (Emphasis ours.)

Petitioners respectfully assert that this was not an equitable action for the reformation of title to real estate. It was a suit against Vaughn Payne for the collection of taxes and for the enforcement of a lien. The complaint so described it (Record, page 1):

> "This action is brought pursuant to 28 U. S. C., Section 1396."

and, Record, page 3:

> "This action is also based on 26 U. S. C., Section 3678" (I. R. C. 1939).

This particular provision of the statutes is entitled, "Civil action to enforce lien on property."

This was a suit against Vaughn Payne based upon a deficiency assessment and for a foreclosure of liens upon real estate.

The District Court made a finding of fact and entered a conclusion of law that:

> "The defendants Vaughn C. Payne and Edith Pruitt Payne are indebted to the United States for interest accrued on the deficiency assessments made against them. * * * " (Record, pages 36 and 37).

The District Court also concluded that:

> "The United States of America has liens for the aforesaid taxes and interest on all property owned by Vaughn C. Payne and Edith Payne and each of them * * * " (Record, page 38):

and it ordered sale of all the real estate to foreclose the liens (Record, pages 39-41).

The complaint was not based on the trust fund theory; and at no time during the trial of the case in the District

Court was this theory presented, considered, argued or briefed.

It is true that in the prayer for relief (of the complaint) the plaintiff asked for a reformation of title with respect to the parcels of real estate held by the entirety. (Record, page 4), but the allegations of the complaint itself clearly demonstrate that the action was predicated on the lien theory. (It is interesting to observe that the prayer for relief did not ask for reformation of title to the one parcel held by Edith Payne alone. It did not even mention this parcel; and yet the Circuit Court of Appeals in its opinion included this parcel as one of the three which were sold upon a reformation of title.)

The language of the opinion admits that the procedure was a foreclosing of the lien which thereupon would become perfected and legally existing against the properties by virtue of the filing of the assessment list as to him in 1949 (Opinion, page 7).

Petitioners respectfully urge that this was either a suit based upon the assessment and lien theory—or a suit (against a transferee) under the "trust fund theory." It cannot be both. Since an assessment was made against Dr. Payne, and since it is a suit to reduce his delinquent taxes to judgment, the holding in **U. S. v. Updike**, 32 Fed. (2d), page 1, tells us that this is and must be a suit based on assessment and therefore not under the "trust fund theory."

Under such circumstances Edith Payne's property (held by the entirety or individually) could not be liable for her husband's taxes because no notice, demand or assessment was made against her. The Updike case holds clearly that if an assessment is made against the taxpayer, an assessment must likewise be made against the transferee. Had an assessment not been made against Dr. Payne, perhaps

a suit could have been sustained against Mrs. Payne, as a transferee under the trust fund theory. In the words of the Updike opinion, 52 Fed. (2d), pages 4, 4:

> "It is probably true that the government could now maintain this suit, if the assessment had not been made in 1920; and probably true that, if the assessment had never been made it could now be made. But it still remains true that this is not a suit 'without assessment,' and is therefore not within the savings clause."

The judgment included 50% penalties for fraud, although fraud was not pleaded. The opinion (page 10) refers to "the false or fraudulent returns filed by Payne * * *"; and yet the complaint did not allege that the returns were false or fraudulent. The law is undisputed that allegations of fraud must be pleaded with particularity, and proved

Kitheart v. Metropolitan Life Insurance Co., 88 Fed. (2d) 407;

Rule 9 (b), Rules of Civil Procedure.

The only purported fraud complained of was a transfer of assets from Vaughn Payne to his wife and himself. However, any such transfers must necessarily have been made in 1944 and 1945 when the property vested in them as tenants by the entirety (Record, page 60). But the assessment against Vaughn Payne was not made until 1949. A transferee cannot be held liable for fraud penalties where the transfer is before assessment. Mertens, Vol. 9, Sec. 53.08, page 496 (citing ruling No. 1029 General Counsel, Bureau of Internal Revenue, CB VI-I, page 117).

Likewise, even if there had been a transfer of the one parcel of real estate to Mrs. Payne which vested in 1947, it could not be sold for a lien covering fraud penalties imposed upon an assessment made against Vaughn Payne in 1949.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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APPENDIX.

Opinion.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 15,620.

Vaughn C. Payne and Edith Pruitt Payne, Appellants, vs. United States of America, Appellee.	Appeal from the United States District Court for the Eastern District of Missouri.

[August 8, 1957.]

Claude I. Bakewell (Gillette F. Wright with him on the brief) for Appellants.

Davis W. Morton, Jr., Attorney, Department of Justice (Charles K. Rice, Assistant Attorney General, A. F. Prescott, Attorney, Department of Justice, and Harry Richards, United States Attorney with him on the brief) for Appellee.

Before Gardner, Chief Judge, Johnsen, Circuit Judge, and Donovan, District Judge.

Johnsen, Circuit Judge.

In 1949, the Commissioner of Internal Revenue made assessment against Vaughn C. Payne, of tax deficiencies

and fraud penalties, for each of the years 1942 to 1947, inclusive.

Notice of the determinations, which had been previously made, and demand for payment were properly served on Payne. And the assessment list was duly transmitted to and received by the Collector, with notice of lien being filed by him with the Recorder of Deeds for the City of St. Louis, Missouri.

Thereafter, from 1950 to 1953, Payne made payment of the deficiencies and penalties for the years 1942, 1945 and 1946, except interest thereon from the date of assessment to the time of payment.

On August 27, 1953, at the request of the Commissioner and on the direction of the Attorney General, this action was instituted in the District Court, against Payne and his wife,[1] (1) to have the remaining amount of the deficiencies, penalties and interest reduced to judgment against Payne; (2) to have it decreed that two described pieces of real estate, acquired in 1944 and 1945, with title taken and standing in the name of Payne and his wife as tenants by the entirety, had been purchased with funds of Payne, had left Payne without sufficient other assets to pay his outstanding tax liabilities, and had had for their transaction purpose the defrauding of Payne's creditors, including the United States; (3) to have it decreed that a third piece of real estate, acquired in 1947, with title taken and standing in the wife's name, had been purchased with funds of Payne, constituted a conveyance and transfer to her without consideration, and had left Payne without sufficient assets to pay his outstanding tax liabilities; and (4) to have enforced, under 26 U. S. C. A., Int. Rev. Code of 1939, § 3678, the lien, which existed from the Collector's

[1] Some other parties were also named as defendants, but they are not involved on this appeal.

receiving of the assessment list, as well as such other rights as the United States had in the circumstances to have the real estate subjected to the payment of the tax liability involved.

Between the institution of the suit and the time of the trial, Payne made payment of the deficiencies and penalties assessed for the year 1943 and a part of those assessed for the year 1944, but again without the interest due thereon from the date of assessment to the time of payment. At the time of trial, there remained a balance of deficiencies and penalties, for the years 1944 and 1947, in the sum of $19,799.21, together with the accumulated interest on the deficiency and penalty for each year, 1942 to 1947, from the date of the assessment until the deficiency and penalty for the year had been or should be paid.

The District Court entered a judgment against Payne on this basis. In so doing, it upheld all of the deficiencies determined by the Commissioner to exist, and found as a fact that the understating of income in which Payne had engaged had been done by him with the fraudulent intent to evade part of the taxes owing from him for each of the years involved, so that the Commissioner had been entitled to impose the fraud penalties which he did, under 26 U. S. C. A., Int. Rev. Code of 1939, § 293 (b).

The court further held that the two pieces of property, standing in the name of Payne and his wife as tenants by the entirety, had been purchased with funds of Payne, and that the using of Payne's funds for this purpose, with the taking of title in this form, had legally made Payne insolvent as to his creditors. It held also that this equally was true as to the third piece of property, title to which stood in the name of the wife alone, and that, beyond this, the circumstances under which the wife had taken title had involved a specific intent on the part of both her and Payne to defraud his creditors, in that, when

the property was purchased, title had been placed in the name of a third party, who had given back a deed in blank, and that the wife's name had been inserted in this deed as grantee, only after the Commissioner's assessment of tax deficiencies and fraud penalties had occurred and Payne had been given notice thereof.

The court accordingly decreed that the United States was entitled "to a reformation of the title of each of the real properties * * * vesting such title in the defendant Vaughn C. Payne, with whose funds such properties were purchased", and to have foreclosure and sale of the property made for the satisfaction of its liens thus existing, pursuant to 28 U. S. C. A., §§2001 and 2002.[2]

In addition to the judgment and decree provisions which have been set out, the court also entered a personal judgment against the wife, for the unpaid interest existing as to the 1942 deficiency and penalty, from the date of the assessment thereof to the time that Payne had paid the deficiency and penalty for that year. Judgment was so entered against the wife, because of the fact that she had placed her signature upon the return filed for 1942, below the signature of Payne, and the court held that it therefore constituted a joint return and had the effect of creating a joint and several liability against her as well as Payne, for whatever tax obligation there existed for the year 1942.

On this appeal, taken by both the husband and the wife, the entering of this personal judgment against the wife, for the unpaid interest on the 1942 deficiency and penalty, is first attacked. Relatively, only a small pecuniary amount is involved, but the wife apparently feels that

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[2] One of the pieces of property was subject to a valid, previous mortgage, and the decree contained provision properly protecting the superior rights of the mortgagee.

there has been an arbitrary attempt to perpetrate an injustice upon her and that she is entitled to vindication as a matter of principle.

The 1942 return, in its heading, listed Payne's name alone, as the taxpayer for whom the report was being made. It gave his occupation as a physician and showed, as the only item of income and source tax liability involved, compensation for personal services in the amount of $6406.70. Payne duly signed on the line indicated for "Signature of taxpayer." There were two other blank lines appearing on the form—one to the left of the taxpayer's signature line, indicated as being for "Signature of person (other than taxpayer or agent) preparing return", and another below the taxpayer's signature line, with the indication, "If this is a joint return (not made by agent) it must be signed by both husband and wife." The wife had placed her signature on this line.

She testified that she had no earned or other income as a basis for any signing by her of the 1942 return as a taxpayer. She was a housewife and was not engaged in any outside employment. Nor was she possessed of any other sources of income. She had not placed her signature upon any of the other returns involved and did so on the 1942 return only because "I thought that was where I had to sign because I helped to fill it out." She had no reason and no intent to sign the form as the making of a joint return. And there was at that time no advantage to the husband in having her join in the return.

The Commissioner seems to have so construed the situation throughout the years, for no notice of deficiency had ever been mailed to her either separately or jointly, and no assessment of deficiency had ever been made against her. The complaint in the present suit had alleged that the 1942 return, the same as those for the other years involved, was Payne's individual income tax return. And

the prayer of the complaint contained no demand for any relief aaginst her, except in her transferee status. The claiming of personal liability against her for interest on the 1942 deficiency and penalty assessed against Payne, between the date of the assessment and the time that Payne had made payment of them, was apparently a matter of trial sweep and victory thrust.

The placing of the wife's signature upon the return, at the place where this was done, would, of course, prima facie entitle the situation to be regarded as one of joint return. But there is no statute or rule of law that makes such a situation absolute and conclusive, so that a mistake by a wife, in having signed her husband's tax return to show that she had assisted in the preparation of it but having placed her signature on the wrong line of the form, would be legally incapable of being explained or escaped by her.

The circumstances which have been set out seem to us to be without any rational basis of conviction or persuasion for a finding and conclusion in the situation that the 1942 return was signed by the wife as either an actual or a purported taxpayer. This part of the court's judgment is accordingly, as a matter of fairness, reversed.

In all other respects, however, we think that the judgment and decree are entitled to be affirmed.

The wife has contended that there was no basis on which to subject her to transferee liability, because no assessment had ever been made against her under 26 U. S. C. A., Int. Rev. Code of 1939, § 311, and that, without such an assessment against her, no lien could exist upon her title or rights in the property involved, under 26 U. S. C. A., Int. Rev. Code of 1939, § 3670.

But the need for assessment as to a transferee has application only to the making of collection under the sum-

mary administrative procedures provided for in § 311 and related sections. These provisions do not preclude the bringing, in appropriate legal and equitable circumstances, of a plenary suit against a transferee to subject property received by him from a taxpayer, to the payment of income taxes owed by the latter, under the trust fund doctrine. **Leighton v. United States**, 289 U. S. 506, 53 S. Ct. 719, 77 L. Ed. 1350; 9 Merten's Law of Federal Income Taxation, § 53.04.

It is true that the decree here included a declaration that the Government had a lien upon the property involved against the wife as transferee. The property was not sold, however, upon the basis of a foreclosure of such a purported lien, but upon "a reformation of the title" as to each of the three pieces of property, so as to vest all of them in Payne personally, and a foreclosing of the lien which thereupon would become perfected and legally existing against the properties by virtue of the filing of the assessment list as to him in 1949.

Nullification of the titles standing in the Paynes as tenants by the entirety was necessary under Missouri law in order to make these properties legally liepable and reachable for Payne's individual tax liability. See **United States v. Hutcherson**, 8 Cir., 188 F. 2d 326. And the court also properly set aside the wife's title to the third piece of property as a fraudulent conveyance. In this situation, the question of separate lien as a matter of assessed transferee liability is of no importance.

The titles, as they stood, were duly entitled under Missouri law to be set aside as fraudulent conveyances, in their relation to Payne's tax liability, and to be made to vest in him individually or personally, so that they could be subjected to the satisfying of his tax liability. There was at the time that each of the pieces of property was purchased and title taken in a manner that did not leave

them subject to complete legal reach for Payne's individual liabilities, income tax obligations owing from him to the Government, which had not been satisfied and which were sought to be made the subject of judgment against him in this suit.

The Missouri courts have repeatedly held—with the following quotation from **Oetting v. Green,** 350 Mo. 457, 166 S. W. 2d 548, 550, being typical and here used in example—as follows: "A voluntary conveyance of land is fraudulent in law and void against existing creditors regardless of intent, if it includes so much of the debtor's property so as to leave him without means to pay his debts. **Friedel v. Bailey,** 329 Mo. 22, 44 S. W. 2d 9. The burden shifts to the party accepting the conveyance to show that debtor has retained such means."

The evidence here amply supports the finding of the trial court that the purchase and placing of title to the various pieces of property, at the time and in the manner in which each was done, rendered Payne insolvent. It also clearly entitled the court to hold that the fraud penalties imposed by the Commissioner were warranted and proper.

Appellants make the contention, however, that the court had no right to uphold and grant recovery for the fraud penalties in the present action, because the complaint failed to allege that recovery for fraud was being sought and to set out the facts and circumstances constituting the alleged basis for the charge.

Rule 9 (b) of the Federal Rules of Civil Procedure, 28 U. S. C. A., dealing with "Pleading Special Matters", requires that, "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity". We should doubt that this Rule has any application to a complaint in a suit to collect

assessed tax deficiencies and fraud penalties, of which the taxpayer has administratively been given due notice of determination, assessment, and demand for payment. In any event, however, we are satisfied that it would not preclude the court from entering a judgment upholding such fraud penalties, where, as here, the question of their validity has been fully tried, where it is clear that the taxpayer knew that the question would be and was being made the subject of trial,[3] and where he raised no objection to the sufficiency of the complaint in this respect until after the conclusion of the trial. A copy of the assessment list, showing the amounts of the deficiencies and the penalties of 50% imposed upon these amounts, was attached to and made a part of the complaint, and this was, in our opinion, sufficient in the circumstances, as against the time and form of appellants' attack, to make the judgment properly supported by the pleadings.

Even in the regular administration of Rule 9 (b) and the carrying out of its general purpose, it is to be borne in mind that, as stated in 1 Barron and Holtzoff, Federal Practice and Procedure, § 302, p. 593, "the sufficiency of a pleading must largely depend upon the nature of the case, the complexity or simplicity of the transaction or occurrence, the relationship of the parties and the determination of how much circumstantial detail is necessary to give notice to the adverse party and enable him to prepare a responsive pleading".

The final contention made by appellants is that collection of the deficiencies and penalties, or of a part of them, was barred by the statute of limitations. We are unable to see any basis whatsoever for this contention.

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[3] As a matter of fact, appellants' answer made express reference to "ad valorem 50% fraud penalty", claimed that they on this ground were entitled to a jury trial, and also spoke of the "burden of proof in fraud cases."

Subsection (a) of § 276 of the Internal Revenue Code of 1939, 26 U. S. C. A., provides: "In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such a tax may be begun without assessment, at any time." Subsection (c) further provides: "Where the assessment * * * has been made within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court, but only if begun (1) within six years after the assessment of the tax * * *."

The false or fraudulent returns filed by Payne for the years 1942-1947, with intent to evade taxes, entitled the Commissioner, under § 276 (a), to make assessment of deficiencies and fraud penalties for these years at any time, and he did so in 1949. Under § 276 (c), he had the right to bring suit to collect the assessed deficiencies and penalties within six years after the assessment, and he did so in 1953. Under Missouri law, a limitation period of 10 years obtained for setting aside the fraudulent conveyances existing as to the properties involved, which had been purchased in 1944, 1945 and 1947. **Rogers v. Brown**, 61 Mo. 187; V. A. M. S., § 516.010. Thus neither under federal law, as a suit to collect the assessed deficiencies and penalties, nor under Missouri law, as a suit to set aside the fraudulent conveyances (if state law could have any application) was the action barred.

Appellants purport to see in **United States v. Updike**, 8 Cir., 32 F. 2d 1, aff'd 281 U. S. 489, 50 S. Ct. 367, 74 L. Ed. 984, some support for their contention that the action here is barred, but we are not able to follow their reading of that case nor their argument in respect to its significance. The only part of the opinion that has any materiality here is its holding that the six-year limitation, under § 276 (c), upon the Government's right to collect a tax, which has been made the subject of an assessment

against the taxpayer, by a proceeding in court, as much precludes the maintenance of an action after that period against a transferee of the taxpayer's assets as one against the taxpayer personally. But that does not help the wife in her position of transferee here, for the suit, both as to her and as to Payne, was commenced within six years after the making of the assessment against Payne.

This is as far as it is necessary to discuss appellants' contentions.

The personal judgment entered against the wife for interest on the 1942 deficiency and penalty is reversed. In all other respects, the judgment and decree are affirmed.

Reversed in part, affirmed in part.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.